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In the Supreme Court of the United States

OCTOBER TERM, 1977

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
PETITIONER

v.

ALLAN BAKKE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

and

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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On October 17, 1977, this Court ordered the parties to file "a supplemental brief discussing title VI of the Civil Rights Act of 1964 as it applies to this case." The United States moves for leave to file a supplemental brief as *amicus curiae* to address that question.

The United States has substantial responsibility for enforcing Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d to 2000d-4. Title VI requires "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity" (42 U.S.C. 2000d-1) to ensure that recipients of federal funds do not discriminate "on the ground of race, color, or

national origin" in any program (42 U.S.C. 2000d). Title VI authorizes federal agencies to withhold funds from non-complying recipients, and 27 agencies have issued regulations addressed to the relationship between affirmative action programs and this enforcement responsibility.

The Department of Health, Education, and Welfare, which provides funds for the Medical School at Davis, has issued regulations (45 C.F.R. 80.3(b)(6)(ii) and 80.5(j)) approving minority-sensitive efforts to overcome the effects of conditions that have resulted in limiting the participation of persons of particular races in federally-assisted programs. The validity of these regulations as an interpretation of Title VI could be directly affected by this case, as could the validity of the regulations of many other federal agencies.

The Court permitted the United States to file a brief as *amicus curiae* and to participate in the oral argument of this case. Because of the unique federal responsibility for construing and enforcing Title VI, the United States has an interest, in addition to the interest described at pages 1-3 of our main brief, in the Court's resolution of the question it has asked the parties to address. The Court therefore should grant leave for the United States to file this supplemental brief.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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STATEMENT

This statement of facts supplements the statement at pages 3-22 of our main brief.

Respondent's complaint stated (A. 2-3) that his claim for relief was founded on the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Privileges and Immunities Clause of the California Constitution, and Title VI of the Civil Rights Act of 1964.[1] Petitioner pleaded,

[1] The complaint erroneously refers to Title VI as "the Federal Civil Rights Act (42 U.S.C. sec. 200(d).)" (A. 3), but the intent of the pleading is clear.

as an affirmative defense (A. 7), that its special admissions program is consistent with Title VI. Petitioner filed a cross-complaint for declaratory relief. It sought a declaratory judgment that the special admissions program was proper, and it alleged (A. 10-11) that an "actual controversy has arisen and now exists" between the parties "relating to whether the special admissions program * * * violates * * * the federal Civil Rights Act (42 U.S.C. § 2000(d))."

The trial court found (Pet. App. 114a), as petitioner had admitted (A. 5, 9), that the University received federal assistance. It held that the special admissions program violated not only the Fourteenth Amendment and the California Constitution but also Title VI (Pet. App. 112a, 117a, 118a). The court entered a judgment declaring that "the special admissions program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U.S.C. § 2000(d)]" (Pet. App. 120a; bracketed material in original).

On appeal in the Supreme Court of California, petitioner discussed Title VI and urged that that statute, as interpreted by regulations issued by the Department of Health, Education, and Welfare, permits admissions programs such as the special admissions program at the Medical School (see Br. 34-35). Respondent did not separately discuss Title VI, noting (Br. 14 n. 1) that it did not require further treatment because it "in many ways parallels the fourteenth amendment."

The Supreme Court of California characterized respondent's contention as an argument that the special admissions program violated the Equal Protection Clause of the Fourteenth Amendment; the court stated that petitioner's cross-complaint sought a declaratory judgment that the "program was valid" (Pet. App. 3a). The court's decision rested entirely on the Fourteenth Amendment (*id.* at 37a), and it mentioned Title VI only in passing (*id.* at 13a n. 10).[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The threshold question here is whether this Court could or should decide whether Title VI either prohibits or authorizes the special admissions program. The Supreme Court of California did not pass on that question, petitioner did not present any Title VI issue in the petition, and respondent's brief did not rely on Title VI as a distinct ground for affirmance of the judgment.

The customary rule is that a "respondent may make any argument presented below that supports the judgment of the lower court." *Hankerson* v. *North Carolina*, No. 75-6568, decided June 17, 1977, slip op. 6 n. 6. See *Langnes* v. *Green*, 282 U.S. 531; Stern, *When to Cross-Appeal or Cross-Petition—Certainty*

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[2] The court simply mentioned that *Lau* v. *Nichols*, 414 U.S. 563, had been decided under Title VI.

or Confusion?, 87 Harv. L. Rev. 763 (1974).[3] The Court has reached statutory issues that were presented (and decided) in the state courts, but not in this Court, when that would allow it to pretermit resolution of difficult constitutional questions. See, *e.g.*, *Boynton* v. *Virginia*, 364 U.S. 454, 457. It also has decided federal statutory issues that were not reached by state courts in light of their disposition of other federal issues. See *Lear, Inc.* v. *Adkins*, 395 U.S. 653; *id.* at 678 (White, J., concurring in part). The Title VI question was presented to the California courts, and they had an opportunity to resolve it. We therefore believe that this Court has the authority to decide this case on Title VI grounds.

Considerations of prudence and respect for state courts, and the limitations on review under 28 U.S.C. 1257, however, suggest that in many cases this Court should allow state courts to consider issues before this Court undertakes to do so. For example, in *Massachusetts* v. *Westcott*, 431 U.S. 322, the Supreme Judicial Court of Massachusetts had held that a state statute was invalid under the United States Constitution. This Court vacated that judgment and remanded the case to allow the state court to consider whether its decision also could rest upon federal statutory grounds.[4] Remanding for further consideration of the

[3] See also pages 16-19 of our brief in *United States* v. *New York Telephone Co.*, No. 76-835, argued October 3, 1977. We have furnished copies of that brief to counsel for the parties to this case.

[4] See also *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (state courts must be given the "first opportunity" to address a federal question, and a question not raised in state court therefore cannot be decided by this Court on certiorari); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 ("due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there [, and] * * * error is not to be predicated upon their failure to decide questions not presented"). Although some of the discussion in *McGoldrick* may be taken as stating that this Court will not consider issues that the state court did not actually decide, we believe that the more accurate conclusion is that this Court has the power to pass on issues that were either presented to or decided by the state court. Any other conclusion would allow the state courts to compel this Court to decide particular issues, even though prudence might counsel disposing of the case on other grounds. As we read *Cardinale* and *McGoldrick*, the only jurisdictional requirement is that the federal issue sought to be raised here have been presented to or decided by the state courts.

federal statutory issues is, similarly, an available option here.

On the assumption that the Court has decided to consider the Title VI question in the present case, we turn to a discussion of the issues that question raises. As a preliminary matter, we believe that Title VI protects white persons as well as all other persons. See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-285 (Title VII of the same statute prohibits discrimination against members of any racial group). But this is only the beginning of the inquiry because, as the Court observed (427 U.S. at 281 n. 8), that case did not involve any question concerning the propriety under the statute of an affirmative action program.

A logical precondition to respondent's reliance on Title VI is a conclusion that Title VI creates a claim for relief enforceable by private parties. No provision of Title VI explicitly authorizes private suits, and this Court has not decided whether they may be maintained, although *Lau* v. *Nichols*, 414 U.S. 563, awarded relief to private plaintiffs in a suit to enforce Title VI. For the reasons we discuss at pages 26-34, *infra*, we believe that Title VI does create judicially-enforceable private claims, for the same reason that other civil rights statutes do so. See, *e.g.*, *Allen* v. *State Board of Elections*, 393 U.S. 544, 555-557. Because the propriety of a private action to enforce the provisions of Title VI is not a jurisdictional question, however, the failure of either petitioner or respondent to present the issue to the state courts precludes consideration of it now.

We discuss the substantive meaning of Title VI at pages 7-23, *infra*. The legislative history of that statute reveals no hostility to voluntary plans of integration. Title VI was designed to assist black persons, and others often excluded from federally-assisted programs, to receive the benefits of those programs. There is no support for a conclusion that Title VI bans minority-sensitive decisions that would assist in achieving this objective.

This Court has held that a parallel prohibition in Title VII of the same statute sometimes *requires* consideration of race in making employment decisions. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405. It has held that a prohibition against discrimination in ap-

portionment of legislative districts does not prohibit consideration of race in bringing about fair apportionments. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144. Similarly, Title VI does not prohibit the employment of minority-sensitive criteria in order to overcome the lingering consequences of past discrimination and to prevent the Medical School from denying to minority applicants equal opportunity for a federally-assisted medical education.

Any doubt of this is resolved by the regulations issued by the many federal agencies interpreting Title VI. Congress instructed the agencies to issue interpretive regulations, and they are entitled to great deference. *Lau* v. *Nichols*, *supra*, 414 U.S. at 566-569 (opinion of the Court), 571 (Stewart, J., concurring). The regulations issued by the Department of Health, Education, and Welfare approve voluntary affirmative action designed to include minority persons in the programs of recipients of federal money.

ARGUMENT

I

A MINORITY-SENSITIVE PROGRAM TAILORED TO OVERCOME THE EFFECTS OF PAST DISCRIMINATION DOES NOT VIOLATE TITLE VI

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be ex-

> cluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Respondent has argued that this provision forbids affirmative action programs, including the special admissions program at the Medical School, because they "exclude" applicants on racial grounds. We argued in our principal brief (Br. 30-65) that the Constitution does not bar the Medical School from taking race into account in order fairly to compare minority and non-minority applicants. We now submit that Title VI does not prohibit the Medical School from employing a minority-sensitive program that the Constitution would permit.

A. The Legislative History Shows That Title VI Was Designed to Assist Minority Persons in Obtaining the Benefits of Federally-Assisted Programs

Title VI was part of a sweeping package of remedial measures designed to eliminate racial discrimination from much of society. See generally *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241; *Katzenbach* v. *McClung*, 379 U.S. 294. Title II forbade discrimination in public accommodations, Title VII in employment. The Act as a whole was intended to deal with the discrimination against black persons then pervasive in our society, discrimination depriving them of the "rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens." H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963).

At the time the Act was being considered, blacks often were denied the benefits of programs supported with federal funds. Title VI was designed to put an end to federal support of discrimination and to assure to blacks "the right to access" to federally-assisted programs. 110 Cong. Rec. 5243 (1964) (statement of Senator Clark).[8] Representative Celler, the Chairman of the House Judiciary Committee and the principal House proponent of Title VI, stated (*id.* at 2467) that:

> [i]t seems rather shocking • • • that while we have on the one hand the 14th amendment which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal government aiding and abetting those who persist in practicing racial discrimination.

Congress recognized that private suits were making some progress in opening opportunities to racial minority groups; it sought, in Title VI, to expedite that progress both by explicitly declaring in Section 601 that discrimination was forbidden and by creating, in Section 602, 42 U.S.C. 2000d-1, the remedy of terminating federal funds for programs that contin-

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[8] Senator Pastore, Senate floor manager for Title VI, explained: "[T]itle VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and our public policy" (110 Cong. Rec. 7062 (1964)). Senator Humphrey, Senate floor manager for the entire bill, expressed a similar view. 110 Cong. Rec. 6544 (1964). (The language of Section 601 that is relevant here remained the same in consideration by both the House and Senate.)

ued to practice discrimination. See, *e.g.*, 110 Cong. Rec. 7054 (1964) (remarks of Senator Pastore); see also *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 853 (C.A. 5), affirmed *en banc*, 380 F.2d 385, certiorari denied *sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840.

Title VI thus was designed to strengthen enforcement of the constitutional guarantee of treatment of all persons as equals, and it applied that guarantee to federally-assisted programs whether or not the recipients of the federal money were state bodies directly subject to the Fourteenth Amendment. Congress sought to afford the full constitutional protection to all intended beneficiaries of federal assistance.[6] Title VI, which opened the doors of federal programs to minority applicants who were formerly excluded, should not be interpreted to close those doors when the recipients of federal assistance have voluntarily implemented affirmative action programs that are consistent with the Constitution.

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[6] This case does not present the question whether Title VI and the Constitution treat differently state programs that have a racially disproportionate impact. The special admissions program deliberately used racial criteria, and any differences between intentional discrimination and disproportionate effect do not require consideration here. Compare *Lau* v. *Nichols*, 414 U.S. 563, 568, with *Jefferson* v. *Hackney*, 406 U.S. 535, 549-550 n. 19. See also *Washington* v. *Davis*, 426 U.S. 229; *International Brotherhood of Teamsters* v. *United States*, No. 75-636, decided May 31, 1977, slip op. 9 n. 15. This case involves only the question whether a conceded resort to race is justified, and for that purpose it makes no difference whether disproportionate impact is enough to establish a *prima facie* case of violation of Title VI.

Indeed, Title VI was intended to induce voluntary achievement of the objective of equal treatment. See, *e.g.*, H.R. Rep. No. 914, *supra*, at 18; 110 Cong. Rec. 13700 (1964) (remarks of Senator Pastore); *id.* at 6546 (remarks of Senator Humphrey). The proviso of Section 602 requiring each federal agency to seek voluntary compliance before resorting to coercive enforcement exemplifies this objective. For the reasons we have discussed in our main brief, voluntary efforts to overcome the effects of prior discrimination often will entail use of minority-sensitive criteria. If Title VI were understood to bar voluntary use of minority-sensitive criteria to deal with the lingering consequences of prior discrimination, it would effectively prohibit recipients of federal funds from opening their programs to the formerly-excluded groups—in other words, to prohibit voluntary use of minority sensitive criteria would be, in many cases, to prohibit recipients of federal funds from achieving the major objective of Title VI.[7]

B. Parallel Anti-Discrimination Provisions Permit the Use of Minority-Sensitive Criteria

Section 601 prohibits "exclusion" of persons, and other discrimination, "on the ground of race, color,

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[7] It would defeat the purpose of the statute—to open federally-assisted programs to persons of all races—if recipients could not attempt to deal with the lingering effects of discrimination elsewhere in society that was hindering participation by some groups in the programs. See pages 38-40 of our main brief. Title VI therefore does not prohibit voluntary efforts to overcome the consequences of discrimination by third parties.

or national origin * * *." The cognate provision of Title VII of the same statute, 42 U.S.C. 2000e-2, makes it unlawful for an employer "to fail or refuse to hire" any applicant "because of such individual's race, color, religion, sex, or national origin * * *." These statutes have a similar effect; "excluding" someone from the benefits of a program is not materially different from not hiring that person and thereby denying him the benefits of employment; discrimination "on the ground of" race is not materially different from discrimination "because of" race. It therefore is significant that the Court has upheld the use of racial criteria in making employment decisions, when that is necessary to ensure that the employer's decisions are not racially biased. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425. If Title VII permits (and, in some cases, requires) appropriate consideration of race in making employment decisions, Title VI permits appropriate resort to minority-sensitive criteria in making decisions about admission to medical school.[8]

[8] Title VI also applies to employment decisions by certain programs receiving federal funds. Compare Section 604, 42 U.S.C. 2000d-3 (no employment decision is covered by Title VI unless "a primary objective of the Federal financial assistance is to provide employment") with Section 703(a), 42 U.S.C. 2000e-2(a) (employment discrimination is unlawful). It seems unlikely that Congress would have intended Title VI and Title VII to establish different standards for assessing the legality of minority-sensitive decisions and thereby forbidden, in federal programs that have a primary objective to provide employment, employment decisions that would be permitted under Title VII.

The Voting Rights Act of 1965 also contains a provision barring any voting procedure or qualification that denies or abridges "the right of any citizen of the United States to vote on account of race or color" (79 Stat. 437, 42 U.S.C. 1973). This statute, too, permits officials to take race into account in order to make decisions that ultimately are evenhanded; the State may take race into account in order to apportion legislative districts in a way that fairly represents the voting strength of different racial and ethnic groups. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144. If voluntary remedial use of race is permitted under the Voting Rights Act, nothing less should be permitted under Title VI.

Moreover, whether or not Title VI prohibits practices that have a racially disparate effect in the absence of a racial motive,[9] the statute surely allows administrators of federally-assisted programs to be suspicious when their practices result in a racial composition for their program that does not fairly reflect the racial composition of the pool of potential applicants.[10] Administrators who observe such a racial

[9] See note 6, *supra*.

[10] Petitioner has not argued that the admissions program at the Medical School during its first two years violated Title VI because of its disproportionate exclusion of minority applicants, and the present record would not permit an investigation of that question. See *Hazelwood School District* v. *United States*, No. 76-255, decided June 27, 1977 (study of relevant population or applicant groups necessary to determine whether statistical information about hiring rate establishes discrimi-

disproportion—as the Medical School experienced during its first two years (see page 9 of our main brief)—should be entitled to take steps to overcome whatever factors are contributing to that result. That, we believe, is the meaning of *Albemarle* and *United Jewish Organizations*: the federal civil rights laws, designed to make programs meaningfully open to minority applicants, do not prohibit the steps necessary to achieve that result. Indeed, federal regulations prohibit a recipient of funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 C.F.R. 80.3(b)(2).[11]

The elimination of racial separation is an important governmental objective. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16; *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 94-95. It would require strong evidence, evidence missing from either the structure or the legislative history of Title VI, to support the conclusion that Congress has inhibited state agencies from volun-

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nation); 41 Fed. Reg. 52669 *et seq.*, to be codified at 28 C.F.R. 42.406 (Department of Justice Title VI regulations requiring the collection of relevant population data by race).

[11] This Court applied that regulation in *Lau* v. *Nichols*, *supra*, in holding that a neutrally-applied school board policy of providing instruction only in English violated the rights of Chinese-speaking students under Title VI.

tarily endeavoring, in a way consistent with the Constitution, to attain that objective.[12]

C. Federal Regulations Interpreting Title VI Endorse Minority-Conscious Programs

Section 602, 42 U.S.C. 2000d-1, requires federal agencies to promulgate regulations interpreting Title VI. These regulations, which are required to be approved by the President,[13] are entitled to the greatest respect as guides to the meaning of Title VI. *Lau* v. *Nichols*, 414 U.S. 563, 566-569 (opinion of the Court), 571 (Stewart, J., concurring). The regulations remove any doubt about the proper interpretation of Title VI.

The Department of Health, Education, and Welfare, which provides most of the federal assistance to institutions of higher education, has adopted regula-

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[12] The lower courts have reached divergent, but not necessarily mutually inconsistent, results under Title VI. See *Uzzell* v. *Friday*, 547 F.2d 801 (C.A. 4) (Title VI prohibits racial allotments of membership of student government and student honor court); *Otero* v. *New York City Housing Authority*, 434 F.2d 1122 (C.A. 2) (Title VI permits consideration of race to promote integration); *Flanagan* v. *President and Directors of Georgetown College*, 417 F. Supp. 377 (D. D.C.) (Title VI prohibits allotment of scholarship funds by race but may permit consideration of race in making admissions decisions); *Anderson* v. *San Francisco Unified School District*, 357 F. Supp. 248 (N.D. Cal.) (Fourteenth Amendment and Title VI prohibit preference for minority group members in choosing school administrators).

[13] By Executive Order 11764, dated January 21, 1974, 39 Fed. Reg. 2575, the President delegated this authoirty to the Attorney General. This delegation took place after the adoption of most of the regulations referred to in this brief.

tions providing that recipients of assistance that have previously engaged in racial discrimination must undertake "affirmative action to overcome the effects" of that discrimination. 45 C.F.R. 80.3(b)(6)(i). The regulations also provide that, even in the absence of prior discrimination, a recipient of federal funds "may take affirmative action to overcome the effects of conditions which resulted in limiting participation [in the program] by persons of a particular race, color, or national origin." 45 C.F.R. 80.3(b)(6)(ii).[14]

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[14] Twenty-six other federal agencies have adopted regulations substantially identical to 45 C.F.R. 80.3(b)(6). The similarity of the regulations represents a considered decision by the Executive Branch.

An interagency committee recommended to the President the uniform adoption of the following amendment to the Title VI regulations of Federal agencies (36 Fed. Reg. 23448):

> This regulation does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where previous discriminatory practice or usage tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of the Act.

This and a number of other proposed amendments were published on December 9, 1971, as proposed regulations for 21 agencies. 36 Fed. Reg. 23448-23512.

The original 21 agencies and four others adopted, with presidential approval, a regulation including either the language originally suggested or a modification. The Department of Health, Education, and Welfare adopted the modified language discussed in the text; this language was intended to clarify the responsibilities of educational institutions, not to change the substance of the provision. The final regulations were published on July 5, 1973. 38 Fed. Reg. 17919-17997. The agencies included: Civil Service Commission, 5 C.F.R. 900.404(b)(6); Department of Agriculture, 7 C.F.R. 15.3(b)(6); Atomic Energy Commission (now Nuclear Regulatory Commission), 10 C.F.R. 4.12(f); Federal Home Loan Bank Board, 12 C.F.R. 529.4(b)(6); Small Business Administration, 13 C.F.R. 112.3(b)(3); Civil Aeronautics Board, 14 C.F.R. 379.3(b)(3); National Aeronautics and Space Administration, 14 C.F.R. 1250.103-2(e); Department of Commerce, 15 C.F.R. 8.4(b)(6); Tennessee Valley Authority, 18 C.F.R. 302.3(b)(6); Department of State, 22 C.F.R. 141.3(b)(5); Agency for International Development, 22 C.F.R. 209.4(b)(6); Department of Housing and Urban Development, 24 C.F.R. 1.4(b)(6); Department of Justice, 28 C.F.R. 42.104(b)(6); Department of Labor, 29 C.F.R. 31.3(b)(6); Department of Defense, 32 C.F.R. 300.4(b)(4); Office of Emergency Preparedness, 32 C.F.R. 1704.5(f) (1974 rev.); Veterans Administration, 38 C.F.R. 18.3(b)(6); Environmental Protection Agency, 40 C.F.R. 7.5; General Services Administration, 41 C.F.R. 101-6.204-2(a)(4); Department of the Interior, 43 C.F.R. 17.3(b)(4); Department of Health, Education, and Welfare, 45 C.F.R. 80.3(b)(6); National Science Foundation, 45 C.F.R. 611.3(b)(6); Office of Economic Opportunity (now Community Services Administration), 45 C.F.R. 1010.4(b)(6); National Foundation on the Arts and Humanities, 45 C.F.R. 1110.3(b)(6); Department of Transportation, 49 C.F.R. 21.5(b)(7). Regulations have since been adopted by ACTION, 45 C.F.R. 1203.4(b)(4), and the Water Resources Council, 18 C.F.R. 705.4(b)(5).

The regulations provide an illustration to demonstrate the meaning of this latter provision. 45 C.F.R. 80.5(j) provides:

Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

The Department of Health, Education, and Welfare has interpreted these regulations, and with them Title VI, as permitting consideration of race in the university admissions process because minority-sensitive admissions criteria are a means to achieve a more thorough and fair consideration of minority applicants. See 38 Fed. Reg. 17978. These regulations, adopted "to make services more equitably available" (36 Fed. Reg. 23494), are consistent with the purpose of Title VI and should be sustained.[15]

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[15] Some employment decisions also are covered by Title VI (see note 8, *supra*), and enforcement in these circumstances is governed by the Policy Statement of the Equal Employment Opportunity Coordinating Council (see Appendix C to our main brief). This statement encourages "voluntary affirmative action * * * to achieve equal employment opportunity" (*id.* at 5A), and this Policy Statement therefore offers further support for the conclusion that Title VI does not prohibit properly designed affirmative action programs.

D. Developments After the Passage of Title VI Demonstrate That it Does Not Prohibit Properly Designed Affirmative Action Programs

The propriety of affirmative action programs has been a matter of considerable congressional debate in the years since Title VI was enacted. Attempts have been made to prohibit or limit such programs, and all of these attempts have been unsuccessful. The fate of these attempts gives some indication about the meaning of Title VI. Cf. *Califano* v. *Sanders*, 430 U.S. 99.

As our main brief discussed, perhaps the most prominent affirmative action program was established by Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303, which required federal contractors to take affirmative action to counteract disproportionately low employment of racial minorities. The Comptroller General concluded that this program was unlawful under Titles VI and VII. 49 Comp. Gen. 59 (1969). The Attorney General, on the other hand, issued an opinion stating that the program was lawful. 42 Op. Att'y Gen. No. 37 (1969). The Comptroller General then urged Congress to enact legislation that would override the Executive Order; after lengthy consideration by Congress, his request was rejected. See Comment, *The Philadelphia Plan: A Study in the*

Dynamics of Executive Power, 39 U. Chi. L. Rev. 723, 748-750 (1972).

The controversy was revived in 1972, when Congress thoroughly reconsidered the existing civil rights legislation. Representative Dent proposed an amendment that would have transferred jurisdiction of the executive order program and forbidden any "preferential treatment" of persons of any race (see 117 Cong. Rec. 31981, 31984 (1971). The amendment was defeated (*id.* at 32111). In the Senate several proposals were made and defeated; the proposals and arguments are discussed in Comment, *supra*, at 754-757.

In 1976 issue was joined once more. Representative Eshleman offered an amendment to the General Education Provisions Act that would have barred the Secretary of Health, Education, and Welfare from requiring "the imposition of quotas, goals, or any other numerical requirements on the student admission practice of an institution of higher education * * * receiving Federal funds" (122 Cong. Rec. H4316 (daily ed., May 12, 1976)). Representative Chisholm objected that this amendment would bar effective remedies for established racial discrimination, and Representative Eshleman replied (*id.* at H4316) that "[t]his amendment is in no way aimed at [remedies for racial discrimination]." The House adopted the amendment (*id.* at H4317).

The Senate bill had no comparable provision, and the Conference Committee resolved the difference by modifying the legislation to provide that "[i]t shall

be unlawful for the Secretary to defer or limit any Federal financial assistance on the basis of any failure to comply with the imposition of quotas (or any other numerical requirements which have the effect of imposing quotas) on the student admission practices of an institution of higher education * * *." The statute, as so amended, was enacted. Education Amendments of 1976, Pub. L. 94-482, 90 Stat. 2233, adding Section 440(c) to the General Education Provisions Act, 20 U.S.C. (1976 ed.) 1231i(c). Thus the statute ultimately enacted did not prohibit goals or timetables; moreover, it is significant that the statute applied only to programs *required* by the federal government, rather than to programs voluntarily adopted. Congress therefore concluded, at least by negative implication, that minority-sensitive programs employing goals and timetables do not violate Title VI.[16]

The present Congress also has considered the propriety of minority-sensitive programs. Representative Levitas proposed an amendment to an appropriations bill that, in the words of Representative Ashbrook, would have limited the federal government's ability "to initiate, carry out or enforce any program of affirmative action" (123 Cong. Rec. H6099 (daily

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[16] The Conference Committee stated that the amended language took no position on the question whether the Secretary of Health, Education, and Welfare could withhold federal funds because an institution of higher learning declined to adopt goals or timetables. H.R. Conf. Rep. No. 94-1701, 94th Cong., 2d Sess. 243 (1976). This reservation did not pertain, however, to the lawfulness of voluntarily-adopted minority-sensitive programs.

ed., June 17, 1977)). The proposed amendment was itself amended until it provided only that no "ratio, quota, or other numerical requirement related to race" could be required as a condition of federal funding; the bill then was passed by the House (*id.* at H6106). Representative Levitas explained that the bill meant "simply that no numerical quotas can be involved and, beyond that, goals, timetables, affirmative action, can all be implemented" (*id.* at H6103). Representative Ashbrook stated (*id.* at H6099) that if a "university wants to enact a program of this type, wants to have [an affirmative action] office, that would be their individual right, but this [amendment] would prevent the Government from being able to force them." Once more, Congress acted on the assumption that voluntary affirmative action programs do not violate Title VI.[17]

At the same time, Congress enacted legislation indicating that affirmative action is not inconsistent with the goal of the elimination of discrimination. The Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, Section 110, 90 Stat. 1002, includes a provision that bars discrimi-

[17] There was no comparable provision in the Senate bill, and the Conference Committee has deleted the House provision because it was excessively restrictive. The Senate Conferees relied, in part, on a letter from the Secretary of Health, Education, and Welfare objecting to the provision. See 123 Cong. Rec. H8330 (daily ed., August 2, 1977) (remarks of Representative Flood). The entire appropriations measure has not been reported back by the Conference Committee, however, because of a disagreement about the provision of federal funds to pay for abortions.

nation on the ground of sex and provides that compliance with the non-discrimination provision shall be enforced through the administrative machinery established "with respect to racial and other discrimination" under Title VI. 42 U.S.C. (1976 ed.) 6709. On May 13, 1977, the President signed the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116-117. Section 103 of the 1977 statute adds subsection (f)(2) to Section 106 of the 1976 Act, 42 U.S.C. (1976 ed.) 6705, to require, among other things, that no grant shall be made "unless the applicant gives satisfactory assurance * * * that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The passage of this provision, in light of congressional recognition of the applicability of Title VI to projects funded under the Act, indicates that, in the view of Congress, affirmative action is consistent with the prohibition against discrimination contained in Title VI.[18]

[18] The constitutionality of Section 103 is currently being litigated in a number of suits. See, *e.g.*, *Constructors Association of Western Pennsylvania* v. *Kreps*, W.D. Pa., No. C.A. 77-1035, decided October 13, 1977 (plaintiff's motion for preliminary injunction denied), appeal pending, C.A. 3, No. 77-2335; *Associated General Contractors of California* v. *Secretary of Commerce*, C.D. Cal., No. C.A. 77-3738, decided November 2, 1977 (plaintiffs' request for declaratory and injunctive relief granted in part); *Montana Contractors' Association* v. *Kreps*, D. Mont., No. C.A. 77-62-M, decided November 7, 1977 (plaintiffs' motion for preliminary injunction denied); *Florida East Coast Chapter of the Associated General Contractors of America* v. *Secretary of Commerce*, S.D. Fla., No. 77-8351-CIV-JE, decided November 3, 1977 (plaintiffs' motion for preliminary injunction denied).

II

PRIVATE PERSONS MAY SUE TO ENFORCE THE ANTIDISCRIMINATION PROVISION OF TITLE VI

A. The Title VI issue was raised by respondent's initial pleading. Title VI does not, however, explicitly provide for private enforcement of its terms, and it could be argued that the provision in Section 602 for government enforcement implicitly precludes private suits.[19] Although the United States submits that private persons may bring suit to enforce Title VI, we believe that the question is not open in this case.

The question whether there is a private cause of action to enforce Title VI was not raised or litigated in the state courts. Although respondent relied on Title VI, petitioner did not argue that Title VI may not be enforced in private suits; to the contrary,

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[19] One court of appeals, in the course of holding that private persons may not bring suits to enforce Title IX of the Education Amendments of 1972, has indicated that Title VI does not permit private suits either. *Cannon* v. *University of Chicago*, 559 F.2d 1063 (C.A. 7). Other courts, however, have either held or assumed that Title VI establishes a private right of action. See, *e.g.*, *Uzzell* v. *Friday*, 547 F.2d 801 (C.A. 4); *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (C.A. 5), certiorari denied, 388 U.S. 911; *Flanagan* v. *President and Directors of Georgetown College*, 417 F. Supp. 377 (D. D.C.); *Laufman* v. *Oakley Building & Loan Co.*, 408 F. Supp. 489, 498-499 (S.D. Ohio); *Natonabah* v. *Board of Education*, 355 F. Supp. 716, 724 (D. N.M.). Cf. *Marin City Council* v. *Marin County Redevelopment Agency*, 416 F. Supp. 707, 709 n. 4 (N.D. Cal.); *Southern Christian Leadership Conference, Inc.* v. *Connolly*, 331 F. Supp. 940 (S.D. Mich.).

petitioner pleaded that there is an "actual controversy" between the parties concerning the lawfulness of the special admissions program under Title VI (A. 10) and sought a declaratory judgment that the program was lawful. Petitioner thus abandoned any argument that the Title VI issues may not be raised by a private plaintiff.

On review of a decision of a state court, this Court may not reach issues that were neither presented to nor decided by the state courts. Compare *Massachusetts* v. *Westcott*, 431 U.S. 322, with *Cardinale* v. *Louisiana*, 394 U.S. 437, and *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430. Cf. *Singleton* v. *Wulff*, 428 U.S. 106, 119-121.

It would be necessary to decide the question whether private plaintiffs may bring suit to enforce Title VI only if that question were "jurisdictional." See, *e.g.*, *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 278-279. But the question is not jurisdictional; this Court twice has reached the merits of a Title VI question in a private suit without discussing the ability of a private plaintiff to raise Title VI questions, a course that would have been inappropriate if the question were jurisdictional. See *Lau* v. *Nichols*, *supra*; *Jefferson* v. *Hackney*, 406 U.S. 535, 549-550 n. 19.

Even if the question were open, this would be an inappropriate case in which to resolve it. Private rights of action to enforce Title VI might be viewed in three ways. First, they might be seen as rights "implied" from the purpose and structure of Title VI

and therefore authorized by Title VI itself; in that event the case would present only issues of federal law. Second, they might be seen as suits by third party beneficiaries of the contracts between the federal agencies and the recipients of the federal funds; [20] in that event the terms of the grant would be federal, but the right to recover might depend on state law. See *Miree* v. *DeKalb County*, No. 76-607, decided June 21, 1977 (suit by air crash victims as third party beneficiaries of federal airport safety grant is governed by state law). Issues of this sort would turn on provisions of state law that have not been discussed at any time in this litigation and that could not be resolved by this Court. Third, because this suit was commenced in state court, there is a possibility that state law might confer a right of action to enforce Section 601 even if no suit could be brought in federal court. This question, too, involves state law issues that this Court could not resolve. These different approaches complicate the question and require careful consideration in the lower courts.

Nevertheless, the issue was raised by petitioner at oral argument (Tr. 23), and, out of an abundance of caution, we briefly present our views on the first of these approaches, the existence of an implied federal cause of action.

B. 1. The Voting Rights Act of 1965, like Title VI of the Civil Rights Act of 1964, provides that no person shall be discriminated against because of race.

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[20] See *Lau* v. *Nichols*, *supra*, 414 U.S. at 571 n. 2 (Stewart, J., concurring).

The Voting Rights Act, like Title VI, does not explicitly provide for private actions to enforce its terms. This Court held that private persons may bring suit to enforce the personal rights conferred on them by the Voting Rights Act. It reasoned that "[t]he achievement of the Act's laudable goal could be severely hampered * * * if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen* v. *State Board of Elections*, 393 U.S. 544, 556. The Court found it significant that the Voting Rights Act applied to large numbers of political subdivisions, and that the great number of potential violators made it infeasible for a single Department of the Executive Branch to police all of the jurisdictions subject to the Act.

The same reasoning applies to Title VI. Great numbers of federally-assisted programs are subject to the requirements of Section 601, and it is unrealistic to suppose that the agencies of the Executive Branch will be able to detect all violations of the statute or to commence enforcement proceedings whenever they detect a violation. "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401. Private suits to enforce the Civil Rights Act of 1964 are an indispensible complement to enforcement initiated by the Executive Branch. The statute "might well prove

an empty promise unless the private citizen were allowed to seek judicial enforcement" (*Allen, supra,* 393 U.S. at 557).[21]

2. The strongest argument against allowing private suits to enforce Section 601 is that Congress established in Section 602 an elaborate mechanism for governmental enforcement by federal agencies. The structure of Title VI, however, cuts against a conclusion that the establishment of administrative enforcement methods precludes private judicial enforcement.

Section 601 creates personal rights. It provides that "[n]o person in the United States shall, on the ground of race, * * * be excluded" from participation in any federally-assisted program. The rights created by Section 601 run in favor of every person. Congress could as easily have provided that: "No program discriminating on account of race shall receive federal funds." If it had expressed the prohibition in that way, there would be a strong argument that persons such as respondent could not bring suit.[22] But the statute actually enacted was far broader; it instructs recipients of federal money not to discriminate. It was designed to end discrimination, not simply to allocate federal money to programs that did not discriminate.[23] Private suits will be valuable in achieving the statute's goal.[24]

A private action is especially useful in light of the practical limitations on the scope of administrative relief under Section 602. That provision allows federal agencies to terminate the funding of programs that practice unlawful discrimination, but only if "compliance cannot be secured by voluntary means." The remedy available under Section 602 is essentially prospective; a program that has discriminated in the past may continue to receive federal funds if it desists from doing so in the future and takes the steps necessary to come into compliance with the statute. Although future compliance would include, in many cases, rectifying the effects of past discrimination, as a practical matter this process may not afford effective relief to individual victims of unlawful discrimination.

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[21] See also *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412, 424-425 (it was necessary to recognize a private right of action under the Voting Rights Act because it could not be fully enforced "against the many local governments subject to its strictures" if only the Attorney General could sue).

[22] Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26; *Evans* v. *Lynn,* 537 F.2d 571 (C.A. 2) (*en banc*), certiorari denied *sub nom. Evans* v. *Hills,* 429 U.S. 1066.

[23] See, *e.g.,* 110 Cong. Rec. 6049, 7060-7061 (1964) (remarks of Senator Pastore); *id.* at 5090 (remarks of Senator Humphrey); *id.* at 7064 (remarks of Senator Ribicoff).

[24] See also *Rosado* v. *Wyman,* 397 U.S. 397. *Rosado* was a private suit brought to challenge the state administration of a welfare program. The State pointed out that the federal statute granting funds to state welfare programs did not authorize a private action, and it argued that termination of funds was the exclusive remedy. This Court disagreed. It concluded that private plaintiffs could seek to enforce the substantive requirements of the federal statute, explaining (397 U.S. at 420) that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program."

A private action would supplement the administrative process by serving as an additional deterrent to violations before they take place, and it would enable individual victims of discrimination to be made whole. A private action would secure to the intended beneficiaries of Section 601 the full rights Congress gave them. Once programs have accepted federal funds, they incur the obligation not to discriminate; private actions would serve most usefully to enforce that obligation for the years in which funds already have been received, while governmental enforcement under Section 602 serves as a practical matter principally to bring about compliance in the future.[25]

Respondent seeks relief for acts during 1973 and 1974, years in which petitioner accepted federal funds. Those funds cannot be repaid to the federal government, and any termination of funds in the future would be unlikely to have an effect on re-

[25] Even the grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602. The judgment would simply declare the duties of the program so long as it desired to retain the benefit of federal funding. The recipient then would be free to decide whether to continue to accept funds, and it could proceed with the negotiations contemplated by Section 602 to define the contours of compliance. A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concerns that led to the limitations contained in Section 602.

A separate question is presented by the fact that Section 602 contemplates administrative remedies. Although it could be

spondent. If, as he maintains, respondent has been denied rights secured by Section 601, a private action is essential.[26]

3. *Cort* v. *Ash*, 422 U.S. 66, also indicates that a private party may seek to enforce Title VI. Under that case, a court must consider four questions (422 U.S. at 78):

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" * * *—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

argued that this creates a requirement of administrative exhaustion before a private person seeks judicial relief, this is an inappropriate case in which to consider that question. Respondent filed an administrative complaint (R. 278-281), and petitioner has not argued that it was prejudiced in any way by the treatment of this complaint.

[26] This case does not present any question concerning the period within which private suits must be filed. Reliance on a period of limitations is an affirmative defense, and, at least in the federal courts, it is waived if not pleaded in the answer to the complaint. Fed. R. Civ. P. 8(c). In California, too, the defense of limitations is waived if not pleaded. *Strong* v. *Strong*, 22 Cal. 2d 540, 140 P.2d 386. This Court therefore need not consider whether the complaint in this case was timely.

See also *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 37-41.

Section 601 creates a right in favor of all potential beneficiaries of federally-assisted programs; this satisfies the first *Cort* test. There is no contemporaneous legislative history concerning private actions, although there was an inconclusive discussion on the question whether private persons could bring suit to require federal officials to terminate funding for programs that continued to engage in discrimination.[27]

It is more significant, however, that Congress enacted statutes bearing on Title VI twice after the Fifth Circuit's decision holding that private persons could bring suit to enforce Section 601.[28] See 84 Stat. 121; 81 Stat. 787. Congress left the Fifth Circuit's decision undisturbed. And in 1976 Congress enacted the Civil Rights Attorney's Fees Awards Act, Pub. L. 94-559, 90 Stat. 2641, 42 U.S.C. (1976 ed.) 1988, which authorizes courts to grant attorney's fees to the prevailing party in any action brought to enforce,

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[27] Compare 110 Cong. Rec. 6051 (1964) (remarks of Senator Johnson), and *id.* at 2464 (remarks of Representative Poff), with *id.* at 2467 (remarks of Representative Gill), and *id.* at 13876 (remarks of Senator Ervin). Two courts have held that such suits may be maintained. *Adams* v. *Richardson*, 480 F.2d 1159 (C.A.D.C.) (*en banc*); *Gautreaux* v. *Romney*, 448 F.2d 731 (C.A. 7) (by implication).

[28] *Bossier Parish School Board* v. *Lemon*, *supra*.

[29] Many of the supporters of the Civil Rights Attorney's Fees Awards Act explicitly stated that attorney's fees would assist private plaintiffs in maintaining actions under Title VI. See,

among other civil rights statutes, Section 601.[29] These congressional actions appear to have ratified the Fifth Circuit's early decision.[30]

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e.g., 122 Cong. Rec. S16251 (daily ed., September 21, 1976) (remarks of Senator Scott); *id.* at H12159 (remarks of Representative Drinan); *id.* at H12164 (remarks of Representative Holtzman); *id.* at H12165 (remarks of Representative Seiberling). The Seventh Circuit—which itself had recognized in *Gautreaux* v. *Romney*, *supra*, the propriety of private suits to enforce Section 601—has argued that the Civil Rights Attorney's Fees Awards Act does not demonstrate congressional support of private actions. See *Cannon* v. *University of Chicago*, *supra*, 559 F.2d at 1078-1080. It acknowledged that some Members of Congress believed that private suits were authorized, but it pointed to other statements in which Representatives stated that the new legislation did not implicitly authorize private actions. We agree with the Seventh Circuit that the Attorney's Fees Awards Act did not create a "new" cause of action; we rely on it here only to demonstrate that many Members of Congress assumed that it already existed, and to show that Congress has not indicated that a private cause of action is inconsistent in any way with the plan of Title VI.

[30] In dealing with related issues Congress has assumed without question that Title VI established a private right of action. For example, Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. (Supp. V) 794, provides that no handicapped person "shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This provision closely tracks the language of Section 601. It was inserted in the statute with the expectation that it "would * * * permit a judicial remedy through a private action." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974). This Court has instructed a lower federal court to reach the merits of a private suit brought under Section 504. *Campbell* v. *Kruse*, No. 76-1704, decided October 3, 1977. The clear intent of Congress to create a pri-

It is "consistent with the underlying purposes of" Title VI to permit private suits; for the reasons we have already discussed, private suits are an essential aid in enforcing civil rights statutes, because individual violations are likely to be too numerous to be dealt with effectively by agency enforcement alone. Congress authorized attorney's fees in private suits in recognition of that fact. See *Newman* v. *Piggie Park Enterprises, Inc., supra; Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696.

Finally, enforcement of the right to be free from unlawful discrimination on account of race is not "traditionally relegated to state law." To the contrary, the rights conferred by Section 601 are preeminently federal.[31] See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445; *Mitchum* v. *Foster*, 407 U.S. 225.

CONCLUSION

We conclude, therefore, that respondent may maintain this private suit to enforce Title VI. For the reasons we have discussed at pages 7-23, *supra*, however, Section 601 does not prohibit petitioner from voluntarily adopting any minority-sensitive admissions

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vate remedy by using language almost identical to the language of Section 601 strongly supports the position we have taken here.

[31] Federal statutes may, of course, be enforced in state courts of general jurisdiction, unless Congress has indicated that federal courts are to have exclusive jurisdiction. Cf. *Williams* v. *Horvath*, 16 Cal. 3d 834, 129 Cal. Rptr. 453, 548 P.2d 1125; *Brown* v. *Pitchess*, 13 Cal. 3d 518, 119 Cal. Rptr. 204, 531 P.2d 772.

program that is consistent with the Fourteenth Amendment. Consideration of Title VI therefore ultimately does not affect this case,[32] and the judgment of the Supreme Court of California should be reversed in part and vacated in part for the reasons stated in our main brief.

Respectfully submitted.

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[32] Title VI could, however, have independent significance with respect to private recipient institutions to which Fourteenth Amendment standards otherwise might not apply.

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